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No. 09-1142

Supreme Court, U.S.
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In The
Supreme Court of the United States

FIA CARD SERVICES, N.A.,

Petitioner,

v.

JOHN C. GORMAN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* CONSUMER DATA INDUSTRY ASSOCIATION IN SUPPORT OF PETITIONER

ANNE P. FORTNEY
Counsel of Record
JAMES CHAREQ
HUDSON COOK, LLP
1020 19th Street, NW
7th Floor
Washington, DC 20036
(202) 236-6930
afortney@hudco.com

April 21, 2010

Counsel for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF *AMICUS CURIAE*[1]

The Consumer Data Industry Association ("CDIA"), submits its brief in support of petitioner, FIA Card Services, N.A. (*hereinafter*, "FIA").

CDIA is an international trade association, founded in 1906, and headquartered in Washington, D.C. As part of its mission to support companies offering consumer information reporting services, CDIA establishes industry standards, provides business and professional education for its members, and produces educational materials for consumers describing consumer credit rights and the role of consumer reporting agencies ("CRAs") in the marketplace. CDIA is the largest trade association of its kind in the world. Its membership includes more than 200 consumer credit and other specialized CRAs operating in the United States and throughout the world.

In its more than 100-year history, CDIA has worked with the United States Congress and state legislatures to develop laws and regulations governing the collection, use, maintenance, and dissemination of

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[1] The parties were notified of CDIA's intention to file this brief within the time provided by Rule 37.2(a). All parties have consented to the filing of CDIA's *amicus* brief. The consent letters have been filed with the Clerk of Court.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

consumer report information. In this role, CDIA participated in the efforts that led to the enactment of the Fair Credit Reporting Act ("FCRA") in 1970 and every subsequent amendment, including the 1996 amendments[2] that added the furnisher responsibility and preemption provisions that are the subject of FIA's petition.

CDIA's members' business depends upon the willingness of furnishers to voluntarily provide their consumer transaction data to CRAs. The risk of liability created by the Ninth Circuit Court of Appeals' decision threatens to deter furnishers from voluntarily providing their data and thereby threatens the integrity and value of the consumer report information CRAs provide to creditors and other users of consumer report information. For this reason, CDIA is vitally interested in the outcome of this case. Left unreviewed, the Ninth Circuit's decision: (i) upsets Congress' carefully-crafted, nationally-uniform regime for the enforcement of a furnisher's accuracy and completeness responsibilities; and (ii) fails to give effect to the FCRA's clear preemption of private rights of action against information furnishers based on the alleged inaccuracy or incompleteness of the information they provide to CRAs.

CDIA's decades-long central role in the consumer reporting industry, and participation in the process

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[2] *See*, The Consumer Credit Reform Act of 1996, Pub. L. No. 104-208, 110 Stat. 428 (1996).

leading to the FCRA's enactment and amendments, allows CDIA to provide the Court with a unique perspective on the consumer reporting industry's understanding of furnisher responsibilities under the FCRA, the availability of private rights of action against furnishers, and the preemption provisions at issue in this appeal. CDIA can also assist the Court as it considers the national impact of the Ninth Circuit's decision on the furnishers of consumer data who provide the essential information to CRAs that is used to produce the consumer reports used billions of times each year by millions of businesses in the United States.

SUMMARY OF ARGUMENT

Congress recognized the vital role played by CRAs nearly 40 years ago when it enacted the FCRA.[3] Essential to that role is the *voluntary* furnishing of billions of items of consumer data to CRAs each month by as many as 40,000 data furnishers,[4] resulting in the creation and maintenance of files on nearly 200

[3] 15 U.S.C. § 1681(a)(1) ("The banking system is dependent upon fair and accurate credit reporting."); 15 U.S.C. § 1681(a)(2) (the consumer reporting system is an "elaborate mechanism" for investigating and evaluating a consumer's credit worthiness, credit standing, credit capacity, character, and general reputation).

[4] *Sarver v. Experian Information Solutions*, 390 F.3d 969, 972 (7th Cir. 2004) ("the company gathers information originated by approximately 40,000 sources").

million consumers, containing 2.6 billion tradelines.[5] This information is used more than 1.5 billion times each year by creditors, insurers, employers, landlords, law enforcement and counter-terrorist agencies to make important risk-based decisions, hire employees, evaluate the backgrounds of potential tenants, and locate individuals suspected of criminal activity.[6]

By making reliable data available to consumer report users, CRAs provide the information infrastructure that contributes to the soundness, safety and efficiency of employment, housing, insurance, banking, finance, retail credit and law enforcement systems in the United States. The entire consumer reporting system is dependent upon information furnishers' continued voluntary participation in the consumer reporting process. By ignoring the FCRA's plain language and holding that consumers may maintain a private right of action against information furnishers for the alleged furnishing of inaccurate information, the Ninth Circuit has ignored the FCRA express prohibition against such claims and the

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[5] Federal Trade Commission, *Report to Congress Under Sections 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003* (2004) at 8-9, http://www.ftc.gov/reports/facta/041209factarpt.pdf.

[6] *Id.*; *Sarver*, 390 F.3d at 972; Michael E. Staten and Fred H. Cate, *The Impact of National Credit Reporting Under the Fair Credit Reporting Act: The Risk of New Restrictions and State Regulation* at vi (May 2003), http://www.ftc.gov/bcp/workshops/infoflows/statements/cate02.pdf.

FCRA's express preemption of any state law that permits such claims.

The potential furnisher liability that could result from the court's decision will inhibit the furnishing of information to CRAs and will result in less accurate, less complete, and less predictive consumer reports. The potential harm to U.S. consumers and to the nation's economy is incalculable.

The Court should grant FIA's petition for writ of *certiorari* to restore the FCRA's nationally-uniform furnisher enforcement regime which incentivizes information furnishers to provide accurate information to CRAs while insulating them from the multitude of lawsuits that could result if private rights of action alleging the inaccurate furnishing of consumer information to CRAs were permitted.

ARGUMENT

CDIA agrees with, and joins in, the arguments of FIA. CDIA provides its *amicus* brief to discuss the need for this Court to review the Ninth Circuit's decision to give effect to FCRA preemption in light of the FCRA's requirement, under 15 U.S.C. § 1681s-2(a)(2), that furnishers update and correct previously furnished information that is determined to be inaccurate – an argument that is not addressed in FIA's brief. In addition, CDIA explains the harm to consumers, the users of consumer reports and CDIA's

member CRAs that will flow from the Ninth Circuit's decision if unreviewed.

I. THE NINTH CIRCUIT'S DECISION MUST BE REVIEWED TO RESTORE THE INCENTIVES THAT CONGRESS DEVELOPED TO ENCOURAGE FURNISHERS TO VOLUNTARILY PROVIDE THE CONSUMER INFORMATION THAT IS ESSENTIAL TO THE CONSUMER REPORTING SYSTEM.

The FCRA is the product of nearly 40 years of careful legislative development. It has been amended numerous times and now comprises 31 sections and over 23,000 words. Yet, its fundamental objectives remain unchanged. The FCRA was enacted to promote the efficiency of the banking system, meet the needs of commerce, and ensure that CRAs act "with fairness, impartiality, and respect for the consumer's right to privacy."[7] These objectives continue to guide the operations of each of CDIA's member CRAs. But the FCRA's objectives cannot be met solely through CRA diligence.

The consumer reporting system is dependent, in the first instance, on those businesses that provide information about consumers to the CRAs – the "furnishers." Their participation in the consumer

[7] 15 U.S.C. § 1681(a).

reporting system is *entirely voluntary*.[8] No federal or state law *requires* any creditor, insurer, employer, landlord or other business to furnish the information resulting from its consumer transactions to any CRA; yet all users of consumer report information seek the most accurate and complete information to inform their individualized assessments of the risk presented by a particular consumer.[9]

If the Ninth Circuit's decision is left unreviewed, furnishers across the nation will, out of concern for private lawsuits by perhaps thousands of consumers, stop voluntarily furnishing consumer information to CRAs. Consumer reports produced from less robust CRA file information will be less accurate, less complete, and therefore less predictive. The report user's resulting uncertainty concerning a consumer will lead to delays in decision-making and increased costs as users struggle to obtain more complete information from other sources. The costs associated with these delays and additional investigations will be passed along to the consumers who must wait for a decision concerning applications for credit, insurance, employment, housing or other benefits.

In drafting the FCRA, Congress recognized the essential role played by information furnishers. To

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[8] *See*, 16 C.F.R. Pt. 660, App. A ("The Commission encourages voluntary furnishing of information to consumer reporting agencies.")

[9] *See*, 15 U.S.C. § 1681b.

encourage their voluntary participation in the consumer reporting process, Congress imposed *no statutory duties* on furnishers for the first 26 years following the FCRA's enactment. In 1996, Congress amended the FCRA to define a narrow set of furnisher responsibilities,[10] some of which may be enforced through private consumer lawsuits under the FCRA.[11] Importantly, even with these amendments, Congress continued to insulate furnishers from *all private rights of action* relating to the alleged inaccuracy or incompleteness of any information furnished to the CRAs. The furnisher's obligation to furnish accurate information to the CRAs and to correct and update any previously furnished information that is determined to be inaccurate or incomplete is "enforced exclusively . . . by the Federal agencies and officials and the State officials identified in section 621 [15 U.S.C. § 1681s]."[12]

To further the FCRA's accuracy and completeness objectives, Congress added a dispute mechanism allowing consumers to challenge the accuracy and completeness of their furnisher-provided information *through the CRAs* and requiring furnishers to respond to those challenges through the same CRAs.[13]

[10] *See* 15 U.S.C. § 1681s-2 (added by Pub. L. No. 104-208, 110 Stat. 3009-426 (1996)).

[11] *See* 15 U.S.C. § 1681s-2(b).

[12] 15 U.S.C. §§ 1681s-2(c)&(d).

[13] 15 U.S.C. §§ 1681i(a)(2), 1681s-2(b). In 2003, the FCRA was amended to include specific furnisher obligations when a

(Continued on following page)

Congress also authorized governmental agencies, including the Federal Trade Commission ("FTC"), and the States' attorneys general, to bring enforcement actions against furnishers, obtain injunctive relief, and recover civil penalties of up to $2,500 per violation, and damages of up to $1,000, if an existing injunction was violated.[14] Any furnisher "who knows or has reasonable cause to believe" that the information it furnishes to CRAs is inaccurate or incomplete subjects itself to such enforcement actions.[15]

Under the FCRA's uniform enforcement regime, furnishers voluntarily participate in the consumer reporting system because they are confident that governmental authorities will not pursue frivolous inaccuracy and incompleteness claims against them and because the FCRA insulates them from *private* lawsuits alleging the inaccurate or incomplete furnishing of information to CRAs.

Now, nearly 40 years after the FCRA was enacted, over 40,000 furnishers voluntarily provide billions of pieces of information on consumers each month to CRAs that maintain files on over 200 million consumers and provide more than 1.5 billion

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consumer disputes the accuracy of consumer report information directly with the furnisher. 15 U.S.C. § 1681s-2(a)(8). The requirements, which become effective July 1, 2010, may not be enforced by a consumer through a private cause of action. 15 U.S.C. § 1681s-2(d) (referring to § 1681s-2(c)(1)).

[14] 15 U.S.C. §§ 1681s(a)(2)&(3), 1681s(c)(1)(iii).

[15] 15 U.S.C. §§ 1681s-2(a)(1)(A), 1681s-2(c)&(d).

consumer reports each year to consumer report users.[6]

It is Congress' careful balancing of furnisher incentives, consumer rights and governmental enforcement authority that has led to the development of the most accurate, complete and efficient consumer reporting system in the world -- a system now threatened by the Ninth Circuit's decision. By opening the door to potentially widespread private litigation against information furnishers, the Ninth Circuit's decision threatens the foundation of that system.

II. THE NINTH CIRCUIT'S DECISION THREATENS THE EFFICIENCY OF THE NATION'S CONSUMER REPORTING SYSTEM.

The Ninth Circuit's decision that the FCRA permits private California-law actions based on a furnisher's accuracy and completeness obligations errs in two independent ways. Such actions are preempted under FCRA §§ 1681t(a) and 1681t(b)(1)(F).

[6] *See*, FTC, 2004 *Report to Congress* at 8-9.

A. Private rights of action to enforce CCRAA § 1785.25(a) are inconsistent with the FCRA's nationally-uniform regime for enforcing furnisher responsibilities and are, therefore, preempted by FCRA § 1681t(a).

The Ninth Circuit's decision concedes that the FCRA prohibits *any* private claim to enforce the furnisher's accuracy and completeness obligations found in FCRA § 1681s-2(a),[17] but nonetheless holds that a California consumer may privately enforce essentially identical furnisher obligations found in the CCRAA (*see* comparative table below).[18]

FCRA § 1681s-2(a)(1)(A)
A person shall not furnish any information relating to a consumer to any consumer reporting agency if the person knows or has reasonable cause to believe that the information is inaccurate.
Cal. Civ. Code § 1785.25(a)
A person shall not furnish information on a specific transaction or experience to any consumer credit reporting agency if the person knows or should know the information is incomplete or inaccurate.

[17] *Gorman v. Wolpoff & Abramson, LLP*, 584 F.3d 1147, 1162 (9th Cir. 2009).

[18] *Id.* at 1172-73.

In its original decision, the Ninth Circuit recognized that it was creating a fatal inconsistency between federal and state law:

> The only *real inconsistency* arises between the *private* enforcement of California and Massachusetts statutes *and § 1681s-2(c) and (d), which prohibit private enforcement* of the obligations under § 1681s-2(a).[19]

According to the Ninth Circuit, this "inconsistency . . . did not offend the purported goal of uniformity of credit reporting obligations."[20] To be clear, the Ninth Circuit reached the contradictory conclusion that permitting a private lawsuit by a California consumer for a furnisher's alleged inaccurate or incomplete information furnishing does *not* offend the FCRA's national uniformity objective even though *no other State* permits such a claim and the FCRA expressly prohibits such private lawsuits.

Following FIA's petition for rehearing, the Ninth Circuit amended its decision to remove the concession that there was a "real inconsistency" between the private enforcement of the furnisher's accuracy obligations found in California CCRAA § 1785.25(a) and the prohibitions against private enforcement

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[19] *Gorman v. Wolpoff & Abramson, LLP*, 552 F.3d 1008, 1032 (9th Cir. 2009).

[20] *Id.*

found in FCRA § 1681s-2(c) and (d).[21] The withdrawal of the concession does not remove the "real inconsistency." Moreover, even the amended decision remains contrary to the reasoned decisions of those courts that considered the same issue before the Ninth Circuit's decision.[22]

FCRA § 16811(a) preempts *any state law* that is "inconsistent with *any* provision" of the FCRA.[23] FCRA §§ 1681s-2(c)(1)&(d) prohibits the private enforcement of a furnisher's accuracy and completeness responsibilities and the furnisher's duty to correct any previously furnished information that is determined to be inaccurate or incomplete.[24] The private enforcement of the same responsibilities under the CCRAA necessarily stands as an obstacle to the FCRA's nationally-uniform furnisher enforcement

[21] *Compare*, Gorman, 552 F.3d at 1032 *with Gorman*, 584 F.3d at 1172 (deleting the entire paragraph beginning with: "The only real inconsistency. . . .").

[22] *See, e.g., Lin v. Universal Card Servs. Corp.*, 238 F.Supp.2d 1147, 1152 (N.D. Cal. 2002) ("Provisions contained in the CCRAA that stand in conflict with the FCRA were, however, preempted. . . . These provisions [§ 1785.25(g) and § 1785.31] were not excepted from preemption, however, because they are *in*consistent [sic] with the enforcement scheme of Congress under § 1681s-2(d), in matters relating to furnishers of consumer credit information.").

[23] 15 U.S.C. § 16811(a).

[24] 15 U.S.C. §§ 1681s-2(a)(1)&(2).

regime and is, therefore, preempted by FCRA § 1681t(a).[25]

Moreover, the FCRA's exclusive administrative enforcement of the furnisher accuracy and completeness responsibilities furthers – as the Ninth Circuit's decision does not – Congress' objective of incentivizing furnisher participation in the consumer reporting process by ensuring a nationally-uniform enforcement regime that protects furnishers from a multitude of consumer claims alleging the furnishing of inaccurate or incomplete information to CRAs. The Ninth Circuit's decision obstructs the achievement of this Congressional objective.

B. Private rights of action under CCRAA §§ 1785.25(g) and 1785.31 to enforce the furnisher accuracy and completeness responsibilities identified in CCRAA § 1785.25(a) are preempted by FCRA § 1681t(b)(1)(F).

In its decision, the Ninth Circuit had difficulty accepting the *breadth* of preemption provided by Congress under FCRA § 1681t(b)(1)(F) when it used the most all-encompassing language available to it – "any," "with respect to any," and "relating to" – as well

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[25] S. Rep. No. 104-185 at 55 (1994) ("By preempting state and local provisions relating to the subject matter regulated by these provisions of the FCRA, [§ 1681t] establishes the FCRA as the national uniform standard in these areas.")

as the *narrowness* of the exception to preemption Congress provided for when it identified only CCRAA *sub*section 1785.25(a), rather than all of section 1785.25, as being saved from preemption.[26]

FCRA § 1681s-2 regulates both the furnisher's duty to furnish accurate and complete information to the CRAs and who may enforce those duties. The FCRA's plain language preempts *any* state law "respecting" the furnisher's accuracy responsibilities (*i.e.*, a subject matter regulated under § 1681s-2(a)) and "relating" to the furnisher's responsibilities (*i.e.*, the duty, under § 1681s-2(a)(1)(A), to furnish accurate and complete information and, under § 1681s-2(a)(2), to correct previously furnished information that is determined to be inaccurate or incomplete).[27] The FCRA provides only for two specifically-defined narrow exceptions to the FCRA's broad subject matter preemption.[28]

The CCRAA's enforcement provisions, CCRAA §§ 1785.25(g) and 1785.31 – neither of which appear in the FCRA preemption exceptions[29] – provide for *private* rights of action by consumers to enforce a furnisher's accuracy and completeness responsibilities. These state law enforcement provisions necessarily "relate" to the accuracy and completeness subject

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[26] *Gorman*, 584 F3d 1170-71

[27] 15 U.S.C. § 1681t(b)

[28] 15 U.S.C. § 1681t(b)(1)(F)

[29] *Id.*

matter regulated by FCRA § 1681s-2 and are, therefore, preempted by the FCRA's plain language and no California consumer may privately enforce CCRAA § 1785.25(a) against a furnisher. Again, this is not a novel conclusion; rather, it is the holding of every court that considered the issue prior to the Ninth Circuit's decision.[30] The reasoning behind the Ninth Circuit's departure from this settled approach is not supported by the actual language of the FCRA or the CCRAA.

The Ninth Circuit reasons that, although the FCRA does not *actually* save CCRAA subsection 1785.25(g) and section 1785.31 from preemption, the FCRA does not need to because subsection 1785.25(g) imposes no "requirement or prohibition" – the words found at the beginning of the FCRA's subject matter preemption provision upon which the Ninth Circuit built decision. Rather, according to the Ninth Circuit, subsection 1785.25(g) and section 1785.31 merely

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[30] *Roybal v. Equifax*, 405 FSupp.2d 1177, 1181 n.5 (E.D. Cal. 2005); *accord Howard v. Blue Ridge Bank*, 371 FSupp.2d 1139, 1144 (N.D. Cal. 2005); *Lin v. Universal Card Services Corp.*, 238 FSupp.2d 1147, 1152 (N.D. Cal. 2002); *Buraye v. Equifax, et al.*, 2008 U.S. Dist. LEXIS 80732 *21-22 (C.D. Cal. 2008); *Drew v. Equifax Info. Servs.*, 2007 U.S. Dist. LEXIS 53157 *13-14 (N.D. Cal. 2007); *Hogan v. PMI Mortgage Ins. Co.*, 2006 U.S. Dist. LEXIS 32179 *35-36 (N.D. Cal. 2006); *Quigley v. Pennsylvania Higher Educ. Assistance Agency*, 200 U.S. Dist. LEXIS 19847 *8 (N.D. Cal. 2000); *Lacaga v. Debt Recovery Solutions, LLC*, 169 Cal.App.4th 901, 908 (2008), *rehearing denied*, (Jan. 20, 2000), *petition for review filed*, No. S170308 (Cal. Feb. 6, 2009).

provide "for additional avenues through which consumers can ensure compliance with the obligations Congress specifically meant to impose."[31] According to the Ninth Circuit, the CCRAA enforcement provisions are the California *alternative* to Congress' *exclusive* enforcement regime for all of the furnisher's obligations under the FCRA to furnish accurate information to the CRA and to update and correct previously furnished information that is determined to be inaccurate.[32]

For the Ninth Circuit, the fact that Congress expressly saved CCRAA *sub*section 1785.25(a) from preemption while *not even mentioning* subsection 1785.25(g) or section 1785.31 is of no importance. According to the Ninth Circuit, the "plain language" of the FCRA's preemption provision does not apply to these state enforcement provisions.[33] The Ninth Circuit concludes, in effect, that the same Congress that *specifically identified* CCRAA *sub*section 1785.25(a)

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[31] *Gorman*, 584 F.3d at 1172. Subsection 1785.25(g) does impose "requirements" upon furnishers. Under subsection 1785.25(g), a furnisher *is liable* for the failure to comply with any part of section 1785.25 "*unless the furnisher establishes by a preponderance of the evidence*, that at the time of the failure to comply . . . , the furnisher maintained reasonable procedures to comply with those provisions." Cal. Civ. Code § 1785.25(g) (emphasis added). To avoid liability, the furnisher is required to establish certain facts by a preponderance of the evidence. This requirement relates to the subject matter (*i.e.*, furnisher responsibilities) regulated by FCRA § 1681s-2.

[32] 15 U.S.C. §§ 1681s-2(c)(1)&(d).

[33] *Gorman*, 584 F.3d at 1171.

as being saved from subject matter preemption *chose to omit* any reference to *sub*section 1785.25(g) or section 1785.31.

To accept the Ninth Circuit's reasoning then, one must conclude that 7 years after subsection 1785.25(a) was saved from FCRA preemption by the 1996 amendments, when Congress substantially amended the FCRA in 2003, Congress did not amend the FCRA to clarify the scope of preemption under FCRA § 1681t(b)(1)(F) despite knowing that every court to have considered the question up to that time concluded that the FCRA *did, in fact, preempt private lawsuits* under the California law.[29] Those Massachusetts courts that have considered the same issue with respect to the nearly identical Massachusetts law that Congress also saved from preemption have reached similar conclusions.[30]

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[29] *See, supra*, n.24; *see also, Lavaga v. Debt Recovery Solutions, LLC*, 169 Cal.App.4th 901, 910, 86 Cal.Rptr.3d 876, 882 (Cal.App. 2008) ("it is noteworthy that Congress has not chosen to dispute this viewpoint [that private claims to enforce CCRAA § 1785.25(a) are preempted]. In 2003, one year after the U.S. District Court rendered its reported decision in *[Lin]*, Congress made substantial modifications to FCRA. Had it felt *Lin* to be wrongly decided and intended California to maintain the right to bring private consumer actions, a simple amendment would have so provided.")

[30] *See, e.g., Ivet v. Celico Partnership*, 480 F.Supp.2d 422, 433 (D. Mass. 2007), *reconsideration denied*, 2007 U.S. Dist. LEXIS 82869 (D. Mass. 2007); *accord, Islam v. Option One Mort. Corp.*, 432 F.Supp.2d 181, 189 (D. Mass. 2006); *Gibbs v. SLM*

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III. THE FCRA PROHIBITS PRIVATE CAUSES OF ACTION UNDER FCRA § 1681s-2(b) FOR A FURNISHER'S ALLEGED FAILURE TO CORRECT INACCURATE OR INCOMPLETE INFORMATION.

The Ninth Circuit incorrectly holds that a consumer may sue a furnisher under FCRA § 1681s-2(b) for allegedly furnishing inaccurate or incomplete information to a CRA when: (i) the consumer has previously disputed furnished information directly to the furnisher; (ii) the furnisher did not include the notice of dispute when it initially furnished the consumer's information to a CRA; and (iii) the furnisher does not correct the omission following a consumer dispute received through a CRA.[8] Because the Ninth Circuit's decision discovers a private right of action against furnishers *under the FCRA* for the furnishing of inaccurate or incomplete information where none exists, the decision will lead to the filing of similar claims in every state.

The FCRA specifically prohibits any private lawsuit: (i) to recover for a furnisher's failure to include a notice of the consumer's direct dispute in the information furnished to a CRA; or (ii) to recover for a furnisher's failure to correct information previously furnished to a CRA to include the notice of

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Corp., 336 F.Supp.2d 1, 13 (D. Mass. 2004); *Daire v. Capital One Bank*, 2007 U.S. Dist. LEXIS 82870 *4-5 (D. Mass. 2007).

[8] *Gorman*, 584 F.3d 1163-64.

dispute after determining that the furnished information is incomplete or inaccurate.[37]

Although the Ninth Circuit concedes that a consumer has no private right of action against a furnisher for the failure to include a notice of the consumer's direct dispute in the information furnished to a CRA, the Ninth Circuit incorrectly limits that reasoning to the information *initially* furnished to the CRA.[38] Thereafter, despite the language of FCRA §§ 1681s-2(c)(1)&(d) – referring to § 1681s-2(a), the Ninth Circuit holds that a consumer *has* a private right of action under § 1681s-2(b) for the furnisher's failure to correct *previously* furnished inaccurate information.[39] The Ninth Circuit finds this claim in the furnisher's FCRA § 1681s-2(b) duty to investigate a consumer dispute received through a CRA and to report the results of that investigation to the CRA.[40]

According to the Ninth Circuit:

> [A] furnisher does not report "incomplete or inaccurate" information within the meaning of *§ 1681s-2(b)* simply by failing to report a *meritless* dispute, because reporting an actual debt without noting that it is disputed is unlikely to be materially misleading. It is the *failure to report a bona*

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[37] 15 U.S.C. §§ 1681s-2(c)(1)&(d)

[38] *Gorman*, 584 F.3d 1163-64

[39] *Id.*

[40] *Id.* at 1163

> *fide dispute . . . that gives rise to a furnisher's liability* under § *1681s-2(b)*.[4]

The Ninth Circuit, in effect, holds the furnisher to a standard found nowhere in the FCRA. According to the Ninth Circuit, the furnisher who receives a dispute through a CRA must determine whether the dispute is meritorious or bona fide. If the dispute is meritorious or bona fide, the furnisher must correct the information furnished to the CRA or be liable *to the consumer in a private cause of action* brought under FCRA § 1681s-2(b) for the alleged failure to "report the results of the investigation." If, however, the furnisher determines that the dispute is meritless, the Ninth Circuit concludes that the furnisher is not liable to the consumer.[5]

The Ninth Circuit's decision holds the furnisher liable to the consumer under FCRA § 1681s-2(b) if the furnisher's investigation, following a notice of dispute, *inaccurately* determines that the dispute is meritless or not bona fide. No such private cause of action is permitted under section 1681s-2(b). Moreover, the form Notice to Furnishers of Information prepared by the FTC pursuant to § 1681e(d)(2)[6] makes clear that the furnisher's duty under FCRA § 1681s-2(a)(2) to correct or supplement *previously furnished information* applies *any time* a furnisher determines that

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[4] *Id.* (emphasis added).

[5] *Id.* at 1163.

[6] 15 U.S.C. § 1681e(d)(2).

such information is inaccurate or incomplete.[44] Such a determination may come from the furnisher's independent review of its previously furnished information, or in response to a consumer's direct dispute to the furnisher *or a dispute received through a CRA*. Regardless of the cause of the furnisher's determination that previously furnished information is inaccurate or incomplete, the furnisher's duty to correct the information is found only in FCRA § 1681s-2(a)(2). The FCRA makes clear that consumers have no private right of action to enforce any part of subsection 1681s-2(a).[45] The Ninth Circuit may not read FCRA § 1681s-2(b) to create a private right of action that the FCRA expressly prohibits.

Left unreviewed, the Ninth Circuit's decision will give rise to lawsuits in every jurisdiction that will discourage furnishers from continuing to voluntarily furnish consumer transaction information to CRAs. Consumer reports will, as a consequence, become less complete, less accurate and less predictive of a consumer's potential risk. This, in turn, will harm consumers by undermining the efficiency of the consumer reporting system and increasing the costs of those creditors, insurers, landlords, employers and other businesses who rely on consumer reports for their decision-making. The result will be increased delays and transaction costs that will be passed on to

[44] 16 C.F.R. Pt. 698, App. G, Notice of Furnisher Responsibilities.

[45] 15 U.S.C. §§ 1681s-2(c) & (d).

consumers. The Ninth Circuit's decision must be reviewed to avoid such consequences.

CONCLUSION

For the reasons set forth above, FIA's petition for writ of *certiorari* should be granted.

Respectfully submitted,

ANNE P. FORTNEY
Counsel of Record
JAMES CHAREQ
HUDSON COOK, LLP
1020 19th Street, NW, 7th Floor
Washington, DC 20036
(202) 236-6930

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